Supreme Court, U.S.
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In The
Supreme Court of the United States

October Term 1998

MARTIN KING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

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QUESTIONS PRESENTED

I. Whether the split in Circuits should be resolved in favor of the Lee opinion.

II. Whether a conspiracy under 18 U.S.C. § 241 is complete at the time that the agreement is made, making an enhancement under 18 U.S.C. § 844(h)(1) inapplicable.

III. Whether 18 U.S.C. § 844(h)(1) applied in tandem with 18 U.S.C. § 241 impermissibly infringes on the expressive conduct contained in cross burning.

LIST OF ALL PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED
[SUPREME COURT RULE 14(b)]

Alfred Smith

District Court Docket No. 1:96 Cr 54
Court of Appeals Record No. 97-4662

Eugene Smith

District Court Docket No. 1:96 Cr 54
Court of Appeals Record No. 97-4794

Petitioner's counsels are advised that Defendants Alfred Smith and Eugene Smith will be filing a joint Petition for Writ of Certiorari on an in forma pauperis basis.

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Martin King respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (app., infra, 1-4) is unpublished and unreported. The judgment of the district court in United States v. King (app., infra, 5-12) is unreported.

JURISDICTION

The judgment of the United States Court of Appeals or the Fourth Circuit was entered on July 17, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The appendix to this petition contains the pertinent parts of the following statutory provisions: Title 18 of the United States Code, §§ 241 (see app., infra,), and 844 see app., infra,); and Title 42 of the United States Code, § 3631 (see app., infra,)

STATEMENT OF THE CASE

I. Factual Background

Gordon Cullins, an African-American male, and Hazel Sutton, a white female, lived in Sutton's mobile home in a rural area of Hayward, North Carolina (See App., infra, 3, 14-15) Petitioner Martin King, as well as Defendant Eugene Smith and his son, Defendant Alfred Smith, lived across the street from Sutton and were unhappy that an interracial couple lived in their neighborhood. See Id. On

December 31, 1992, it was decided to burn crosses on Sutton's lawn to frighten the couple so they would leave the area. See Id. That evening, at the Smiths' home, Alfred Smith and the Petitioner, Martin King, tied rags and poured kerosene on crosses. See Id. Shortly after midnight, Alfred Smith loaded the crosses into Eugene Smith's truck. See Id. Petitioner King drove Alfred Smith and Leonard Victor Haynes up the hill to the victims' residence. See Id. Alfred Smith and Haynes planted the crosses on Suttons' front lawn. See Id. Alfred Smith then ignited the crosses. See Id. Sutton and Cullins, who were not at home at the time, returned to find the crosses smoldering on their front lawn. See Id. Petitioner King and the co-defendants were across the road in a nearby field yelling racial slurs. See Id.

The factual summary above is drawn from the Fourth Circuit's opinion and the indictments. The sufficiency of the evidence was not raised by Petitioner King and the Smith co-defendants before the Fourth Circuit. The evidence in the record would tend to support the above factual rendition.

II. Proceedings Below

On June 25, 1996, a three-count indictment was filed charging Leonard Victor Haynes, Martin King, Alfred Smith and Eugene Smith with violating 18 U.S.C. § 241 (conspiracy to deny civil rights), 42 U.S.C. § 3631(b)(1) (intimidation of and interference with any person because of his race and because he is occupying a dwelling), and 18 U.S.C. § 844 (h)(1) (use of fire during the commission of any felony) (See app., infra, 13-16). The district court denied defendants' motion to dismiss the violations of 18 U.S.C. § 844 (h)(1) (Count Three).

In January, 1997, jury trial was held as to the Petitioner Martin King, Alfred Smith and Eugene Smith. These three defendants were found guilty on all three counts. Later in 1997, these three defendants were sentenced by the District Court. Petitioner King received a term of 12

months imprisonment on Counts One (18 U.S.C. § 241) and two (42 U.S.C. § 3631), to run concurrently; and a term of 60 months imprisonment on Count Three (18 U.S.C. § 844), to run consecutively to the sentences imposed on the other Two counts. (See app., infra, 5-12)

On appeal to the Fourth Circuit, Petitioner King and the Smith co-defendants challenged their 18 U.S.C. § 844(h)(1) use of fire penalty enhancement convictions on the grounds that the penalty enhancement statute was not applicable to the 18 U.S.C. § 241 conspiracy against civil rights crime. The challenge was two-fold. First, the penalty enhancement statute as applied to the facts of this case (cross burning) was ambiguous and the legislative history does not indicate an intent that the penalty enhancement statute was to be applied to the 18 U.S.C. § 241 cross burning conspiracy against civil rights felony violations (See United States v. Lee, 935 F.2d 952 (8th Cir. 1991), vacated in part, 6 F.3d 1297 (8th Cir. 1993) (en banc), cert. Denied, 511 U.S. 1046 (1994)). Second, since the crime of conspiracy is complete at the time of entering into the unlawful agreement, the penalty enhancement statute would not be applicable to cross burning cases as there was no use of fire involved in the entering into of the unlawful agreement. The Fourth Circuit Court of Appeals followed its recent holding in United States v. Wildes, 120 F.3d 468 (Fourth Cir. 1997), cert. Denied, 118 S.Ct. 885 (1998) and held that the phrase Dany felony C as used in 18 U.S.C. § 844(h)(1) includes conspiracy to violate civil rights by burning a cross and therefore the 18 U.S.C. § 844(h)(1) penalty enhancement statute was applicable to 18 U.S.C. § 241 conspiracy against civil rights cross burning cases (See app. Infra, 4).

On appeal, Petitioner King and the Smith co-defendants also contended that the application of the use of fire penalty enhancement statute [18 U.S.C. § 844(h)(1)] to cross burning conspiracy against rights violation [18 U.S.C. § 241] impermissibly infringed on their First Amendment Rights. The Court of Appeals held that since the issue was

not raised in the district court, it was not reviewable by the Court of Appeals absent plain error or miscarriage of justice (See app., infra, 4)

III. How the Federal Question Was Presented

The jurisdiction of the district court was invoked under 18 U.S.C. §§ 241 and 844 and under 42 U.S.C. § 3631.

REASONS FOR GRANTING THE PETITION

Petitioner asks this Court to grant a Writ of Certiorari to answer three issues. The first two issues relate to whether the use of fire/explosives penalty enhancement statute [18 U.S.C. § 844(h)(1)] can be applied in cross burning conspiracy against civil rights cases [18 U.S.C. § 241)]. The first issue concerns whether the Eighth Circuit determination of inapplicability should be followed or whether the Fourth and Seventh Circuit determination of applicability should govern. [See United States v. Lee, 935 F.2d 952 (8th Cir. 1991), vacated in part, 6 F.3d 1297 (8th Cir. 1993) (en banc), cert. denied, 511 U.S. 1046 (1994); United States v. King, et al., unpublished (Fourth Cir. 1998) (See app., infra, 1-4); United States v. Wildes, 120 F.3d 468 (4th Cir. 1997), cert. denied, 118 S.Ct. 885 (1998); United States v. Hayward, 6 F.3d. 1241 (7th Cir. 1993), cert. denied, 511 U.S. 1004 (1994)] The second issue concerns whether the use of fire/explosives penalty enhancement statute (18 U.S.C. § 844(h)(1)) can be applied to a conspiracy against civil rights felony as the conspiracy against civil rights felony is complete at the time of the entering into of the unlawful agreement and clearly fire was not utilized in the entering into of the unlawful agreement itself. The third issue concerns whether the use of fire penalty enhancement statute applied in tandem with the conspiracy against civil rights statue impermissibly infringes on the expressive conduct contained in cross burning.

This case presents not only an opportunity to correct a split among the Court of Appeals, but also to interpret and effectuate the legislature's true intent as to the applicability of the use of fire/explosives penalty enhancement statute [18 U.S.C. § 844(h)(1)] in cross burning conspiracy against civil rights cases (18 U.S.C. § 241)). This case further presents a case of constitutional significance, that is whether the application of the use of fire/explosives penalty enhancement statute impermissibly infringes on Petitioner's First Amendment Rights.

I. THIS COURT SHOULD GRANT CERTIORARI TO SETTLE A DISAGREEMENT AMONG THE CIRCUITS WITH REGARD TO THE APPLICATION OF THE USE OF FIRE/EXPLOSIVES PENALTY ENHANCEMENT STATUTE [18 U.S.C. § 844(h)(1)] TO THE CONSPIRACY AGAINST CIVIL RIGHTS STATUTE [18 U.S.C. § 241] IN CROSS BURNING CASES AND CORRECT THE FOURTH CIRCUITS ERRONEOUS APPLICATION OF THAT STATUTE.

Direct challenges as to the application of 18 U.S.C. δ 844(h)(1) (a statute mandating a 5 year penalty where fire is used to commit a felony) to 18 U.S.C. δ 241 (a statute delineating the felony crime of conspiracy against civil rights) in cross burning cases, have now been addressed in the Fourth, Seventh and Eighth Circuits and these Circuits have reached conflicting conclusions. *See* United States v. King, et. al., (4th Cir. 1998) (unpublished) (See app. infra, 1-4); United States v. Wildes, 120 F.3d 468 (4th Cir. 1997), cert. denied, 118 S.Ct. 885 (1998); United States v. Hayward, 6 F.3d 1241 (7th Cir. 1993), cert. denied, 510 U.S. 1169 (1994); United States v. Lee, 935 F.2d 952 (8th Cir. 1991), vacated in part, 6 F.3d 1297 (8th Cir. 1993) (en banc), cert. denied, 511 U.S. 1046 (1994).

Lee, *supra*, involved a prosecution under 18 U.S.C. Section 241 and 844(h)(1) arising from the defendant's burning of a cross. The Eighth Circuit Court of Appeals, among other things, directly addressed the applicability of the use of fire/explosives penalty enhancement statute [18 U.S.C. § 844(h)(1)] to the conspiracy against civil rights statute [18 U.S.C. § 241]. *See* Lee, *supra*. The Eighth Circuit Court of Appeals refused to apply the use of fire/explosive penalty enhancement statute [18 U.S.C. § 844(h)(1)] to the conspiracy against civil rights statute [18 U.S.C. § 241] in cross burning cases. *See* Lee, *supra*. In Lee, the court of appeals reversed the conviction under Section 844 (h)(1) holding that the conduct did not fall within the meaning of that section. The court of appeals pointed out that Section 844 was amended in 1982 by the Anti-Arson Act of 1982. This amendment added the use of "fire" to the crime of using an explosive, to commit a felony prosecutable in federal court. The court noted that the "legislative history indicates that Section 844(h)(1) was amended to include use of 'fire' in order to facilitate the prosecution of arson." Lee, *supra*, at 958, citing H.R.Rep. No. 678, 97th Cong., 2nd Secs. 1-2, reprinted in 1982 U.S. Code Cong. & Admin. News 2631-32.

The Eighth Circuit Court of Appeals further recognized that "the amendment was intended to remove the obstacle of proving the prior requirement that the damage caused by arson was caused by means of an 'explosive'". Id. The Court of Appeals recognized that "there is no indication that the amended statute was intended to apply to facts such as those before us" as "Lee did not commit arson, nor did he damage persons or property by the use of fire." Lee *supra* at 958. The Eighth Circuit concluded that they were left to guess as to whether Congress intended § 844(h)(1) to apply to facts such as those, and therefore they must apply the rule of lenity and reverse the convictions. Lee *supra* at 958, citing Bifulco v. United States, 447 U.S. 381, 387, 100 S.Ct. 2247, 2252, 65 L.Ed. 205 (1980)

The Seventh Circuit Court of Appeals in Hayward refused to look at legislative history, concluding that no ambiguity exists as to the application of 18 U.S.C. δ 844(h)(1) to 18 U.S.C. δ 241 when these statutes are facially examined, and, therefore, that resort to legislative history was not warranted. Hayward at 1245. Nevertheless, the Seventh Circuit Court of Appeals did recognize what the present petitioners have argued on appeal; that a conspiracy against civil rights is complete at the time of agreement, that fire gives no vitality to the commission of this conspiracy, and that fire is not used to commit the agreement. *See* Hayward at 1248, Footnote 9. The Seventh Circuit Court of Appeals did not address these arguments, however, because the Hayward appellants failed to preserve the issues giving rise to these arguments for appellate review.

The Fourth Circuit Court of Appeals in Wildes tracks the Hayward reasoning. In the Wildes opinion, the Fourth Circuit Court of Appeals conducts a plain meaning analysis, finds no ambiguity, and therefore, refuses to consider legislative history. Again, however, the Wildes appellants, like the Hayward appellants, did not argue that a conspiracy against civil rights is complete at the time of agreement, that fire gives no vitality to the commission of this conspiracy, and that fire is not used to commit the agreement. In Wildes, the Fourth Circuit holds that 18 U.S.C. δ 844(h)(1) applies to any felony. Wildes at 471.

The Petitioner, in his appeal, confronted the Fourth Circuit squarely with the arguments recognized in Footnote 9 of Hayward. Petitioners argued that a conspiracy against civil rights is complete at the time of agreement, that fire gives no vitality to the commission of this conspiracy, and that fire is not used to commit the agreement. Thus, application of 18 U.S.C. δ 844(h)(1) to 18 U.S.C. δ 241 creates an absurd result, or ambiguity, which warrants a review of legislative history.

The Fourth Circuit failed to consider the Petitioner's arguments and resorted instead to its holding in Wildes, a

holding the Petitioner contends is based upon a flawed plain meaning analysis. A thorough facial analysis of 18 U.S.C. δ 844(h)(1), as applied to 18 U.S.C. δ 241 begs the question of how fire is used to commit an agreement. Because a complete plain meaning analysis presents this question or ambiguity, a review of legislative history is warranted.

The Petitioner contends that once the legislative history of 18 U.S.C. δ 844(h)(1), is reviewed, the conclusion reached by the Eighth Circuit Court of Appeals in Lee is inevitable. When the plain meaning analysis is conducted, ambiguity in the application of 18 U.S.C. δ 844(h)(1) to 18 U.S.C. δ 241 becomes readily apparent. Consideration of legislative history is therefore warranted, and this history clearly indicates that Congress did not intend for 18 U.S.C. δ 844(h)(1) to be applied to 18 U.S.C. δ 241 and that its application in the present case is error.

The Petitioner respectfully requests the Supreme Court to grant certiorari and review this issue in light of the disagreement among the circuits and a legislative history clearly expressing a contrary intent. The legislative history makes clear that the addition of the use of "fire" to commit a federal felony in Section 844(h)(1) was not intended to expand the reach of that statute so as to encompass conduct such as alleged in the instant indictment in which there is no allegation that arson was committed or that any property of another was burned or that anyone was injured as a result of the use of the fire. Furthermore, as noted in United States v. Laporta, 46 F.3d 152, 156-57 (2nd Cir. 1994), the statutory language that Section 844(h)(1) applies to "any felony" is equivocal and ambiguous in light of its context and the statute's legislative history, and the rule of lenity requires that the ambiguity be resolved in the defendant's favor.

II. THIS COURT SHOULD GRANT CERTIORARI TO DECIDE A QUESTION OF FIRST IMPRESSION, AN ANSWER TO WHICH WILL PRO-FOUNDLY EFFECT THE NATURE AND EXTENT OF PROSECUTIONS IN FUTURE CROSS BURNING CASES: WHETHER THE USE OF FIRE/EX-PLOSIVES PENALTY ENHANCEMENT STATUTE [18 U.S.C. § 844(h)(1)] CAN BE APPLIED TO A CROSS BURNING CON-SPIRACY AGAINST CIVIL RIGHTS CASE [18 U.S.C. § 241] AS A CON-SPIRACY AGAINST CIVIL RIGHTS IS COMPLETED AT THE TIME THAT THE CONSPIRATORS AGREE TO AN UNLAWFUL PLAN.

A. Conspiracy Against Civil Rights is Completed at the Time That the Conspirators Agree to an Unlawful Plan. Therefore, the Application of 18 U.S.C. § 844(h)(1) (A Statute Penlizing the Use of Fire in the *Commission* of a Felony) to the Crime of Conspiracy Against Civil Rights is Inherently Ambiguous in The Fire is Not Logically Used to Commit This Crime.

On June 25, 1996, a three-count indictment was filed charging the Petitioner, Martin King, and the co-defendants, Alfred Smith and Eugene Smith, with violating 18 U.S.C. § 241 (conspiracy to deny civil rights), 42 U.S.C. § 3631(b)(1) (intimidation of and interference with any person because of his race and because he is occupying a dwelling), and 18 U.S.C. § 844(h)(1) (use of fire during the commission of any felony) (See, App., infra, 13-17). Petitioner contended before both the district court and the fourth circuit court of appeals that the crime of conspiracy does not require the commission of any overt acts and therefore arises and is effectuated at the time of the unlawful agreement.

Therefore, fire is not used to commit an unlawful agreement and the penalty enhancement statute [18 U.S.C. § 844(h)(1)] is inapplicable to a cross burning conspiracy against civil rights case. Neither the district court or the fourth circuit accepted this analysis.

Petitioner's argument presents a case of first impression as this argument has not been squarely addressed in those above-referenced fourth, seventh and eighth circuit cases that have previously directly addressed the interplay between and the applicability of the use of fire penalty enhancement statute [18 U.S.C. § 844(h)(1)] and the conspiracy against civil rights statute [18 U.S.C. § 241] (See Lee (8th Circuit), supra; Hayward (7th Circuit), supra; Wildes, (4th Circuit), supra; and King/Smith, (4th Circuit), supra, See also app., infra, 1-4) More simply put, no circuit has squarely addressed the question of whether it is possible, given the plain meaning of the 18 U.S.C. § 844(h)(1) statutory scheme, to use fire to commit a cross burning conspiracy (unlawful agreement) against civil rights.

It should be noted that the Seventh Circuit Court of Appeals in footnote 9 of the Hayward opinion did recognize the existence of Petitioner's argument. (See Hayward, 6 F.3d at 1248, Footnote 9) The Seventh Circuit, however, did not address such argument as it held that the defendants in Hayward had waived such argument because it was not presented to the district court. Id. Footnote 9 is reprinted in its entirety immediately below:

> The defendants also argue for the first time on appeal that [t]he offense of 18 U.S.C. § 844(h)(1) requires the defendant to use fire in the commission of another federal felony. Since the federal felony of conspiracy, under 18 U.S.C. § 241, is complete at the time that the agreement is made, the use of fire in the case at bar gives no vitality to the commission of the conspiracy. The fire was not an aid in

> formulating the agreement. The defendants have waived this argument because they did not present it to the district court.

Hayward, 6 F.3d at 1248.

An agreement between two or more persons entered into with the specific intent to injure, oppress, threaten or intimidate the victims because of their race, and because of their exercise of the right to occupy their home is violative of Section 241. United States v. Skillman, 922 F.2d 1370 (9th Cir. 1990), cert. dismissed, 502 U.S. 922 (1991); United States v. Redwine, 715 F.2d 315 (7th Cir. 1983), cert. denied, 104 S.Ct. 2661 (1984). Section 241 provides in pertinent part:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any inhabitant of any State in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having exercised the same; . . . .[They shall be guilty of a crime against the United States]. 18 U.S.C. § 241.

There is no requirement that prosecutions brought under Section 241 plead or prove any overt acts. Skillman, 922 F.2d at 1375-76; United States v. Morado, 454 F.2d 167, 169 (5th Cir.) cert. denied, 406 U.S. 917 (1972). [emphasis added]. In Morado, supra, the Fifth Circuit Court of Appeals stated that: ". . .18 U.S.C. § 241 does not require that any overt act at all be shown. Such showings, if made, go only to aid in the establishment of the element without which the government has no case at all-that an actual agreement between two or more persons to accomplish a prohibited object existed-and to the establishment of which of these

Appellants, if any, were knowing parties to this agreement." Morado 454 F.2d at 169 (citations omitted).

In other words, evidence tending to prove overt acts is circumstantial evidence supporting the conclusion that at some point previous to the occurrence of the overt acts there was an agreement (a conspiracy).

The Trial Court's jury instructions in the present case follow the Morado reasoning. The Trial Court, on instructing the jury on Count 1, the conspiracy count, stated in pertinent party that:

> [A] conspiracy is in a very true sense a partnership in crime in which each member becomes the agent of every other member. The essence of the offense is the agreement to violate or disregard the law.
>
> What the evidence must show to establish that a conspiracy existed is that the members in some way or manner, outwardly or silently, came to a mutual understanding to try to accomplish a common unlawful plan. . .
>
> The evidence need not establish that all the means or methods set forth in the indictment were agreed upon by all the members. Nor that those means or methods which were agreed upon were actually put into operation. But what the evidence must establish beyond a reasonable doubt is that the alleged conspiracy was knowingly formed. . .

[app., infra, ---]

According to Morado and the Trial Court's instructions, no overt act need be proven or undertaken by any conspirator in order for the crime of conspiracy against civil rights to be completed. Any overt acts alleged or proven in a prosecution of conspiracy against civil rights are

not direct evidence supporting any element of the conspiracy. Rather, the overt acts (for instance the burning of crosses) create an inference that an agreement was made but satisfy the elements of substantive counts separate and distinct from the conspiracy count.[1]

In the present case the overt acts alleged by the Government satisfied the elements of Count 2, namely interference with housing rights through a threat of force in violation of 42 U.S.C. § 3631(b)(1). Finally, were Count 2 a felony count, the Appellants concede that 18 U.S.C. § 844(h)(1) would properly apply. Because it is not, the Government attempts to bootstrap 18 U.S.C. § 844(h)(1) to Count 1 which is a felony but a count which neither requires nor contemplates an overt act. This gerrymandering should not be endorsed.

B. Because A Plain Meaning Review of the Statutory Scheme Set Forth in 18 U.S.C. § 844(h)(1), As Applied to 18 U.S.C. § 241, Results in Ambiguity in That Fire Cannot be Used to Agree to an Unlawful Plan, a Review of the Legislative History Behing 18 U.S.C. § 844(h)(1) is Warranted.

In United States v. Wildes, et al, the Fourth Circuit explored the interplay of 18 U.S.C. § 844(h)(1) and 18 U.S.C. § 241. supra. In considering the interplay, the Fourth Circuit conducted an incomplete review of the plain meaning of the phrase "uses fire . . . to commit any felony" as this phrase appears in 18 U.S.C. § 844(h)(1) and is applied to 18

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[1]What makes the felony of conspiracy against civil rights unusual is that there is no corollary substantive felony count. For instance, under the Controlled Substances Act, defendants are frequently charged with conspiracy to possess and the corollary count of possession. Even when a defendant is charged solely with a conspiracy count, punishment for that conspiracy is that of the corollary count (21 U.S.C.§846) and requires some proof that at least one of the co-conspirators committed at least one overt act. Grunewald v. U.S., 353 U.S. 391 (1957).

U.S.C. § 241. In Wildes, the Fourth Circuit first looked at the word "use" and concluded that "[u]nquestionably, setting fire to a wooden cross as a means of intimidation constitutes the use of fire in this ordinary sense." Id. The Fourth Circuit then looked at the word "felony" and concluded that as used, this is an inclusive word meaning any offense punishable by more than one year of imprisonment. The Fourth Circuit, however, failed to consider in deconstructing the 18 U.S.C. § 844(h)(1) statutory scheme is the phrase linking the words "use" and "felony", namely "*to commit*".

The Appellant contends that a complete review of the plain meaning of the statutory scheme at issue, including the phrase "to commit" reveals that 18 U.S.C. § 844(h)(1) cannot legally and logically apply to the felony of conspiracy against civil rights pursuant to 18 U.S.C. § 241.

Unquestionably, setting fire to a wooden cross as a means of intimidation constitutes the use of fire "to commit" the offense proscribed by 42 U.S.C. § 3631(b)(1) as charged in Count 2 of the indictment brought against the petitioner and the Smith co-defendants. Just as unquestionably, however, fire is not used "to commit" an agreement.

When the plain meaning of 18 U.S.C. § 844(h)(1) is considered in conjunction with the elements of a conspiracy against civil rights pursuant to 18 U.S.C. § 241, it is readily apparent that fire is never used "to commit" the felony of a conspiracy against civil rights. A conspiracy against civil rights requires no overt act on the part of any conspirator and is complete at the time an unlawful agreement is formed. Therefore, a thorough plain meaning analysis of the 18 U.S.C. § 844(h)(1) statutory scheme indicates that it does not apply to the felony of conspiracy against civil rights pursuant to 18 U.S.C. § 241 because fire is not used "to commit" this felony.

Had Congress intended for the 18 U.S.C. § 844(h)(1) statutory scheme to apply to a conspiracy against civil rights, the statutory scheme would necessarily state that: whoever uses, *or conspires to use*, fire to commit a felony is guilty of

a crime. . . . This Congress has not done. Thus, the Court must give the plain meaning of the 18 U.S.C. § 844(h)(1)'s statutory scheme and its effect as it applies to 18 U.S.C. § 241. Fire is not used "to commit" the agreement prohibited by 18 U.S.C. § 241.

III. THE USE OF FIRE/EXPLOSIVES PENALTY ENHANCEMENT STATUTE [18 U.S.C. § 844(h)(1)] AS APPLIED IN TANDEM WITH THE CONSPIRACY AGAINST CIVIL RIGHTS STATUTE [18 U.S.C. § 241] TO PUNISH CROSS BURNING IMPERMISSIBLY IN-FRINGES ON THE EXPRESSIVE CONDUCT CONVEYED IN CROSS BURNING.

Applying the use-of-fire enhancement found in 18 U.S.C. § 844(h)(1) to a conspiracy against civil rights under 18 U.S.C. § 241 impermissibly infringes on the expressive conduct conveyed in cross burning. Though this issue was not raised in district court, it is a defect affecting a substantial right of the Appellants, namely their right not to be disproportionately punished by the manner of their expressive conduct, and as such it should be considered by this Court. F.R.Cr.P. 52(b).

In Hayward, the Appellants argued that 42 U.S.C. § 3631 unconstitutionally regulated their right to free expression in burning the crosses. Hayward, 6 F.3d at 1249. In considering this issue the Seventh Circuit Court of Appeals then asked whether crossing burning was expressive conduct. Then it asked whether the statute impermissibly intruded on that expressive conduct in that it conveyed a particularized message and that it was highly likely that the message would be understood by those who viewed it. Id. (citing, *inter alia*, Texas v. Johnson, 491 U.S. 397, 403 (1980); and Spence v. Washington, 418 U.S. 405, 410-11 (1974)).

In considering whether section 3631 intruded on that expressive conduct, the Seventh Circuit Court of Appeals reasoned that section 3631 was content neutral and applied the following test enunciated in United States v. O'Brien:

> a government regulation is sufficiently justified if it is within the constitutional power of the Government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. United States v. O'Brien, 319 U.S. 367, 377 (1968)

Hayward, 6F.3d at 1250.

The Seventh Circuit Court of Appeals in Hayward applied O'Brien, and held that the misdemeanor application of section 3631 to cross burning qualified as a sufficiently justified regulation. Hayward, 6 F.3d at 1250. The Appellants in Hayward presented this argument only to the application of 42 U.S.C. § 3631(b)(1). However, the Appellants in Hayward did not present this same constitutional argument as to the application of the use of fire penalty enhancement statute [18 U.S.C. § 844(h)(1)] to the conspiracy against civil rights statute [18 U.S.C. § 241]. Petitioner contends that under this same Hayward and O'Brien analytical framework, 18 U.S.C. § 844(h)(1)'s use as a mandatory, consecutive, five-year enhancement to 18 U.S.C. § 241 would necessarily fail.

Certainly cross burning is expressive conduct under the tests found in Johnson and Washington. It conveys a message, and it is likely to be understood by its viewers. As

noted, the Hayward court concluded that cross burning involved expressive conduct. Hayward, 6 F.3d at 1250.

Moving to the O'Brien test, it is conceded for argument's sake that both sections 241 and 844(h)(1) satisfy the first two elements of the test. However, element three is more problematic when the two statutes are used together. By applying a five-year, consecutive "use-of-fire" enhancement to cross burning under section 241, the government has chosen to levy an additional punishment to conspirators based on the mode of their expression. For example, if Marty King and Alfred Smith were involved in a similar conspiracy and had spray-painted swastikas and "die nigger and nigger lover" on the outside of the trailer while shouting racial epithets through bull-horns at the tope of their lungs toward Gordon Cullins and Annette Sutton in their trailer all through New Year's Eve 1992, it is unlikely that either King or Smith would have received active jail time. However, because Smith chose to light two crosses, the flames from which the victims never saw, they face 72- and 81-month sentences respectively, which mandates jail time and excludes the possibility of parole. Certainly both situations contain expressive conduct, and both have similar messages. However, one is punished more than the other based solely on the manner by which it is conveyed.

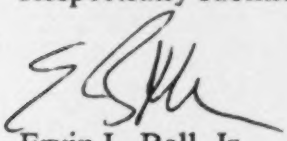
In addition, taken together sections 241 and 844(h)(1) fail the fourth element. Adding the five-year enhancement to a statute that under structured sentencing provides little or no jail time to low-level criminal history defendants is much more than an "incidental restriction" on their choice of expression. See O'Brien, 319 U.S. at 377. Moreover, the government interest under section 241 is the protection of minorities from groups hostile to them based solely on their status as minorities. Certainly punishing the Appellants under a federal felony statute furthers that interest. However, it is not "essential to the furtherance of that interest" to enhance their punishment, in one case by ballooning a 12-month sentence to a 72-month sentence,

simply because the conspirators chose crosses to express their displeasure with the victims. See Id.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 97-4662

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ALFRED SMITH,
Defendant-Appellant.

No. 97-4663

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MARTIN KING,
Defendant-Appellant.

No. 97-4794

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

EUGENE SMITH,
Defendant-Appellant.

Appeals from the United States District Court
for the Western District of North Carolina, at Asheville.
Lacy H. Thornburg, District Judge.
(CR-96-54-1)

Submitted: June 30, 1998
Decided: July 17, 1998
Entered: July 17, 1998

Before WILLIAMS and MICHAEL, Circuit Judges, and HALL, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

COUNSEL

A. James Siemens, Asheville, North Carolina, for Appellant Alfred Smith; Stephen P. Lindsay, LINDSAY & HENSLEY, Asheville, North Carolina for Appellant Eugene Smith; George B. Hyler, Jr., HYLER, LOPEZ & WALTON, P.A., Asheville, North Carolina, for Appellant King. Bill Lann Lee, Acting Assistant Attorney General, Dennis J. Dimsey, Lisa J. Stark, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Appellants Alfred Smith, Eugene Smith, and Martin King were

convicted of conspiring against civil rights, in violation of 18 U.S.C.A. § 241 (West Supp. 1998); interfering by force or threat of force with the occupation of a dwelling because of race, in violation of 42 U.S.C. § 3631(a) (1994); and using fire to commit a federal felony, in violation of 18 U.S.C. § 844(h)(1) (1994). Appellants appeal their convictions and sentences. We affirm.

Gordon Cullins, an African-American male, and Hazel Sutton, a white female, lived together in Sutton's mobile home in a rural area of Haywood, North Carolina. Appellants, who lived across the street from Sutton, were unhappy that an interracial couple lived in their neighborhood. On December 31, 1992, Appellants decided to burn crosses on Sutton's lawn to frighten the couple so they would move from the area. That evening, Alfred Smith and King tied rags to crosses and doused them with kerosene. The Appellants transported the crosses to Sutton's lawn, where they planted and ignited them. Sutton and Cullins, who were not at home at the time, returned to find the crosses smoldering on their front lawn. The Appellants and other individuals were across the street yelling racial slurs and threats, including "nigger lover," "gonna die tonight," and "burn, nigger, burn." Cullins and Sutton stayed at a hotel that night. Afterwards, the Appellants bragged about being involved in the cross burning.

On appeal, Appellants assert that the district court erred in applying 18 U.S.C. § 844(h)(1) to 18 U.S.C. § 241. Appellants claim that given the plain meaning of § 844(h)(1), it is not possible to use fire "to commit" an agreement.

Under § 844(h)(1), "[w]hoever--(1) uses fire or an explosive to commit any felony which may be prosecuted in a court of the United States . . . shall, in addition to the punishment provided for such felony, be sentenced to imprisonment for five years." See 18 U.S.C. § 844(h)(1).* In

* This section was recently amended to impose a mandatory prison term of ten years for a first offense of using fire to commit a felony. See 18

United States v. Wildes , 120 F.3d 468 (4th Cir. 1997), cert. denied, ___ U.S. #6D6D 6D#, 66 U.S.L.W. 3491 (U.S. Jan. 26, 1998) (No. 97-6533), we held that § 844(h)(1) contained clear and unambiguous language that applies to "any felony." See Wildes, 120 F.3d at 471. We concluded "the term 'felony' is an inclusive term meaning essentially an offense of any kind that is punishable by a term of imprisonment for more than one year." Id. at 470. Thus, "the phrase 'any felony' as used in § 844(h)(1) . . . includes conspiracy to violate civil rights by burning a cross." Wildes, 120 F.3d at 471. Therefore, we find that the district court did not err in applying § 844(h)(1) to § 241 in these cases.

For the first time on appeal, Appellants contend that the application of § 844(h)(1) to § 241 impermissibly infringes their First Amendment rights. Because this issue was not presented in the district court, it is not reviewable by this Court absent plain error or fundamental miscarriage of justice. See Muth v. United States, 1 F.3d 246, 250 (4th Cir. 1993). We find neither in these appeals.

Accordingly, we affirm the Appellants' convictions and sentences. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

U.S.C.A. § 844(h)(1) (West Supp. 1998)

UNITED STATES DISTRICT COURT
Western District of North Carolina

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)
Case Number: 1:96cr54-2

George B. Hyler, Jr.
Defendant's Attorney

UNITED STATES OF AMERICA

V.

MARTIN KING

Filed: August 25, 1997
Entered: August 25, 1997

THE DEFENDANT:

[X] was found guilty on counts 1, 2, 3
after a plea of not guilty.

Title & Section	**Nature of Offense**
18 USC 241	Conspiracy against rights
42 USC 3631(b)(1); 18 USC 2	Use of force or threat to deny benefits or rights; aid & abet
18 USC 844(h)(1); 18 USC 2	Use of fire to commit a conspiracy against rights; aid & abet

Date Offense Concluded	Count Numbers
01/01/93	1
12/31/92	2
12/31/92	3

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 241-27-6343

Defendant's Date of Birth: 04/03/74

Defendant's USM No.: 14240-058

Defendant's Mailing Address:

Rt. 3, Box 19
Waynesville, NC 28786

August 1, 1997
Date of Imposition of Sentence

/s/_____
Signature of Judicial Officer

LACY H. THORNBURG
United States District Court Judge

Date: August 25, 1997

IMPRISONMENT

The Defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 12 Months on Ct. 1, and 12 Months on Ct. 2, to run concurrently; and a term of 60 Months on Ct.3, to be served consecutively to the terms imposed for each of Cts. 1&2.

[X] The court makes the following recommendations to the Bureau of Prisons: Defendant shall be required to support all lawful dependents from prison earnings while incarcerated. Such funds shall be forwarded to Mary King, Rt. 3 Box 19, Waynesville, NC 28786.

[X] The Defendant is remanded to the custody of the United States Marshal.

SUPERVISED RELEASED

Upon release from imprisonment, the defendant shall be on supervised release for a term of 2 Years. This term consists of terms of 2 years on each of Cts. 1 & 3, and a term of 1 Year on Ct. 2, all such terms to run concurrently.

STANDARD CONDITIONS OF SUPERVISION

The defendant shall comply with the standard conditions that have been adopted by this court and any additional conditions ordered.

1) The Defendant shall not commit another federal, state, or local crime.
2) The Defendant shall refrain from possessing a firearm, destructive device, or other dangerous weapon.

3) The Defendant shall pay any financial obligation imposed by this judgment remaining unpaid as of the commencement of the sentence of probation or the term of supervised release on a schedule to be established by the Probation Officer.

4) The Defendant shall provide access to any personal or business financial information as requested by the probation officer.

5) The Defendant shall not acquire any new lines of credit unless authorized to do so in advance by the probation officer.

6) The Defendant shall not leave the Western District of North Carolina without the permission of the Court or probation officer.

7) The Defendant shall report in person to the probation officer as directed by the Court or probation officer and shall submit a truthful and complete written report within the first five days of each month.

8) A Defendant on supervised release shall report in person to the probation officer in the district to which he or she is released within 72 hours of release from custody of the Bureau of Prisons.

9) The Defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

10) The Defendant shall support his or her dependents and meet other family responsibilities.

11) The Defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling; training, or other activities authorized by the probation officer.

12) The Defendant shall notify the probation officer within 72 hours of any change in residence or employment.

13) The Defendant shall refrain from excessive use of alcohol and shall not unlawfully purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances,

except as duly prescribed by a licensed physician.

14) The Defendant shall participate in a program of testing and treatment or both for substance abuse if directed to do so by the probation officer, until such time as the defendant is released from the program by the probation officer; provided, however, that defendant shall submit to a drug test within 15 days of release on probation or supervised release and at least two periodic drug tests thereafter for use of any controlled substance, subject to the provisions of 18:3563(a)(4) or 18:3583(d), respectively.

15) The Defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

16) The Defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

17) The Defendant shall submit his person, residence, office or vehicle to a search, from time to time, conducted by any U.S. Probation Officer and such other law enforcement personnel as the probation officer may deem advisable, without a warrant; and failure to submit to such a search may be grounds for revocation of probation or supervised release. The defendant shall warn other residents or occupants that such premises or vehicle may be subject to searches pursuant to this condition.

18) The Defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed by the probation officer.

19) The Defendant shall notify the probation officer within 72 hours of defendant's being arrested or questioned by a law enforcement officer.

20) The Defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court.

21) As directed by the probation officer, the Defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

22) If the instant offense was committed on or after 4/24/96, the defendant shall notify the probation officer of any material changes in defendant's economic circumstances which may affect the defendant's ability to pay restitution, fines or special assessments.

ADDITIONAL CONDITIONS:

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the Schedule of Payments.

ASSESSMENT	FINE	RESTITUTION
$125.00		

FINE

The above fine includes costs of incarceration, if any, and/or supervision.

The defendant shall pay interest on any fine or restitution of more than $2,500.00 unless the fine or restitution is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the Schedule of Payments may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

x The court has determined that the defendant does not have the ability to pay interest and it is ordered that:

x The interest requirement is waived.

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A. [X] in full immediately.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments are to be made to the United States District Court Clerk, 309 U.S. Courthouse, 100 Otis St., Asheville, NC 28801, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program. All criminal monetary penalty payments are to be made as directed by the court or the probation officer.

STATEMENT OF REASONS

X The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary): The Court strikes paragraph 11 in its entirety and the last sentence in paragraph 13. The 2 level enhancement in paragraph 22 for vulnerable victim is stricken, resulting in a total offense level of 13.

Guideline Range Determined by the Court:

Total Offense Level: 13

Criminal History Category: I

Imprisonment Range: 12 to 18 months plus 5 yrs. mandatory consecutive in Ct. 3.

Supervised Release Range: 2 to 3 years for Cts. 1 & 3, and 1 yr. in Ct. 2, all terms concurrent

Fine Range: $3,000 to $30,000

X Fine waived because of inability to pay.

Total Amount of Restitution: $ n/a

x The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION

Docket No. 1:96CR54

Bill of Indictment

18 U.S.C. § 241
42 U.S.C. § 3631(b)(1)
18 U.S.C. § 2
18 U.S.C. § 844(h)(1)

Filed: June 25, 1996
Entered: June 25, 1996

UNITED STATES OF AMERICA

Plaintiff,

v.

LEONARD VICTOR HAYNES,
MARTIN KING,
ALFRED SMITH,
EUGENE SMITH,

Defendants.

INDICTMENT

THE GRAND JURY CHARGES:

COUNT ONE

Beginning in or about the Fall of 1992 and continuing until on or about January 1, 1993, in and around the area of

Haywood County, North Carolina, known as Poison Cove, within the Western District of North Carolina, defendants LEONARD VICTOR HAYNES, MARTIN KING, ALFRED SMITH and EUGENE SMITH did willfully conspire and agree with one another and with others known and unknown to the Grand Jury, to injure, oppress, threaten and intimidate Gordon Cullins, an African-American citizen of the United States, and Hazel Annette Sutton, a white citizen of the United States, both of whom were inhabitants of the State of North Carolina, in the free exercise and enjoyment of the right secured to them by the laws of the United States to occupy and hold real and personal property without injury, intimidation, or interference because of race and association with a person of another race.

It was part of the plan and purpose of the conspiracy to burn crosses in front of the mobile home, located in the Poison Cove area of Clyde, North Carolina, occupied by Gordon Cullins and Hazel Annette Sutton, and thereby to intimidate and interfere with their right to occupy their home, and to associate in that home with a person of another race.

OVERT ACTS

In furtherance of the conspiracy and to accomplish its objectives, the defendants committed the following overt acts, among others, in the Western District of North Carolina.

1. In December, 1992, EUGENE SMITH solicited other persons to participate in burning crosses at the home of Hazel Annette Sutton and Gordon Cullins.

2. On or about December 31, 1992, in the area of Haywood County, North Carolina, known as Poison Cove, at the home of ALFRED SMITH and EUGENE SMITH, two crosses were constructed.

3. On or about the evening of December 31, 1992, ALFRED SMITH and MARTIN KING, and other persons known and unknown to the Grand Jury, wrapped the crosses in rags and soaked them in a flammable liquid.

4. On or about December 31, 1992, in the area of Haywood County, North Carolina known as Poison Cove, ALFRED SMITH, LEONARD VICTOR HAYNES, and MARTIN KING, drove a truck to transport two crosses from the home of EUGENE SMITH to the yard in front of Hazel Annette Sutton's and Gordon Cullins' mobile home.

5. On or about December 31, 1992, ALFRED SMITH and LEONARD VICTOR HAYNES planted the crosses in the yard in front of Hazel Annette Sutton's and Gordon Cullins' mobile home, and set the crosses on fire.

6. On or about December 31, 1992 and January 1, 1993, in the area of Haywood County, North Carolina, known as Poison Cove, ALFRED SMITH and other persons known and unknown to the grand jury shouted racial slurs and threats as the crosses burned and thereafter.

All in violation of Title 18, United States Code, Section 241.

COUNT TWO

THE GRAND JURY FURTHER CHARGES THAT:

On or about December 31, 1992, in and around the area of Haywood County, North Carolina, known as Poison Cove, within the Western District of North Carolina, ALFRED SMITH, EUGENE SMITH, MARTIN KING, and LEONARD VICTOR HAYNES, aiding and abetting each other, by force and threat of force, that is by erecting and igniting two crosses, did willfully injure, intimidate, and interfere with, and attempt to injure, intimidate and interfere with, Hazel Annette Sutton, a white woman, and Gordon Cullins, an African-American man, because they had been participating, and in order to intimidate them from participating, without discrimination on account of race and color, in occupying a dwelling in the area of Haywood County, North Carolina, known as Poison Cove, and in associating with persons of a different race while

occupying the dwelling.

In violation of Title 42, United States Code, Section 3631(b)(1) and Title 18 U.S.C. Section 2.

COUNT THREE

THE GRAND JURY FURTHER CHARGES THAT:

On or about December 31, 1992, in and around the area of Haywood County, North Carolina, known as Poison Cove, within the Western District of North Carolina, EUGENE SMITH, ALFRED SMITH, MARTIN KING, and LEONARD VICTOR HAYNES, aiding and abetting each other, did, by using flammable liquid to soak crosses and then igniting the crosses which had been placed in the yard of the residence occupied by Hazel Annette Sutton and Gordon Cullins, use fire to commit the offense of Conspiracy Against Rights, a felony prosecutable in a court of the United States under Title 18, United States Code, Section 241.

In violation of Title 18, United States Code, Section 844(h)(1) and Title 18, United States Code, Section 2.

A TRUE BILL,

/s/ Marie S. Shook
FOREPERSON

DEVAL L. PATRICK
ASSISTANT ATTORNEY GENERAL
CIVIL RIGHTS DIVISION
UNITED STATES DEPARTMENT OF JUSTICE

/s/ Lou De Baca
LOU DE BACA
LEON RODRIGUEZ
TRIAL ATTORNEYS

CIVIL RIGHTS DIVISION
U.S. DEPARTMENT OF JUSTICE

MARK T. CALLOWAY
UNITED STATES ATTORNEY
WESTERN DISTRICT, NORTH CAROLINA

/s/ Deborah A. Ausburn
DEBORAH A. AUSBURN
ASSISTANT UNITED STATES ATTORNEY
WESTERN DISTRICT OF NORTH CAROLINA

18 U.S.C. §241. Conspiracy Against Rights

If two or more persons conspire to injure, oppress, threaten, or intimidate any inhabitant of any State, Territory, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured-

They shall be fined not more than $10,000.00 or imprisoned not more than ten years, or both; and if death results, they shall be subject to imprisonment for any term of years or for life.

18 U.S.C. §844. Penalties

(h) Whoever-

(1) uses fire or an explosive to commit any felony which may be prosecuted in a court of the United States, or

(2) carries an explosive during the commission of any felony which may be prosecuted in a court of the United States,

including a felony which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device shall, in addition to the punishment provided for such felony, be sentenced to imprisonment for 5 years. In the case of a second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for 10 years. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person

convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the felony in which the explosive was used or carried.

42 U.S.C. §3631. Violations; penalties

Whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with -

. . . . .

(b) any person because he is or has been, or in order to intimidate such person or any other person or any class of persons from-

(1) participating, without discrimination on account of race, color, religion, sex, handicap (as such term is defined in section 3602 of this title), familial status (as such term is defined in section 3602 of this title), or national origin, in any of the activities, services, organizations or facilities described in subsection (a) of this section;

. . . . .

shall be fined not more than $1,000.00 or imprisoned not more than one year, or both; and if bodily injury results, shall be fined not more than $10,000.00 or imprisoned not more than ten years, or both; and if death results, shall be subject to imprisonment for any term of years or for life.

28 U.S.C. §1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

. . . . .

Jury Instructions Excerpt

[A] conspiracy is in a very true sense a partnership in crime in which each member becomes the agent of every other member. The essence of the offense is the agreement to violate or disregard the law.

What the evidence must show to establish that a conspiracy existed is that the members in some way or manner, outwardly or silently, came to a mutual understanding to try to accomplish a common unlawful plan. . . .

The evidence need not establish that all the means or methods set forth in the indictment were agreed upon by all the members. Nor that those means or methods which were agreed upon were actually put into operation. But what the evidence must establish beyond a reasonable doubt is that the alleged conspiracy was knowingly formed. . . .

[See page 819-820 of Trial Transcript; pages 207-208 of Court of Appeals appendix]

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Nos. 98-1024 and 98-6523

In the Supreme Court of the United States

OCTOBER TERM, 1998

MARTIN KING, PETITIONER

v.

UNITED STATES OF AMERICA

ALFRED SMITH AND EUGENE SMITH, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 18 U.S.C. 844(h)(1) (1994), which at the time of petitioners' offenses established a mandatory minimum term of five years' imprisonment for any person who "uses fire or an explosive to commit any felony which may be prosecuted in a court of the United States," such penalty to run consecutive to any other term of imprisonment, was properly applied to a conspiracy under 18 U.S.C. 241 (1994) to burn crosses in order to threaten or intimidate individuals in their exercise of rights secured by federal law.

2. Whether petitioners' convictions violated their rights under the First Amendment.

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OPINION BELOW

The opinion of the court of appeals (98-1024 Pet. App. 1-4) is not reported, but the judgment is noted at 161 F.3d 5 (Table).

JURISDICTION

The judgment of the court of appeals was entered on July, 17, 1998. The petitions for a writ of certiorari were both filed on October 15, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial, petitioners were convicted of conspiracy to threaten or intimidate persons in the exercise of their federally protected rights, in violation of 18 U.S.C. 241;[1] using fire to commit a felony (here, the civil rights conspiracy), in violation of 18 U.S.C. 844(h)(1); and intimidation of and interference with persons because of their race and their occupation of a dwelling, in violation of 42 U.S.C. 3631(a). Each petitioner was sentenced to the mandatory minimum term of five years' imprisonment for his violation of 18 U.S.C. 844(h)(1).[2] For the other offenses, petitioner King was

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[1] Section 241 establishes criminal penalties of up to ten years' imprisonment in cases where "two or more persons conspire to injure, oppress, threaten, or intimidate any person * * * in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same."

[2] At the time of the criminal conduct involved in this case, Section 844(h) required that any person who "uses fire or an explosive to commit any felony which may be prosecuted in a court of the United States * * * shall, in addition to the punishment provided for such felony, be sentenced to imprisonment for 5 years but not more than 15 years." 18 U.S.C. 844(h) (1994). Section 844(h) was amended in 1996, see Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, Tit. VII, § 708(a)(3)(A), 110 Stat. 1296, to provide that such persons should receive a mandatory term of 10 years' imprisonment. 18 U.S.C. 844(h) (Supp. II 1996). Both before and after the 1996 amendment, Section 844(h) has required that the applicable term of imprison-

sentenced to an additional 12 months' imprisonment, petitioner Alfred Smith was sentenced to an additional 21 months' imprisonment, and petitioner Eugene Smith was sentenced to an additional 120 months' imprisonment. The court of appeals affirmed. 98-1024 Pet. App. 1-4.

1. Petitioners lived in a rural area in Haywood, North Carolina. Gordon Cullins, an African-American male, and Hazel Sutton, a white female, lived together across the street from petitioners. Petitioners were unhappy about the presence of a mixed-race couple in the neighborhood. Petitioners decided to burn crosses on the front lawn of Cullins and Sutton in order to frighten the couple so that they would move from the area. Petitioners Alfred Smith and King tied rags and poured kerosene on the crosses. Petitioners drove the crosses to the victims' home, where they planted and ignited the crosses on the front lawn. When Cullins and Sutton returned to their home, they found the crosses smoldering on the lawn. Petitioners and others were across the street shouting racial slurs and threats. 98-1024 Pet. App. 3.

2. The court of appeals affirmed petitioners' convictions and sentences on all three counts. 98-1024 Pet. App. 1-4. Relying on its prior decision in *United States* v. *Wildes*, 120 F.3d 468 (4th Cir. 1997), cert. denied, 118 S. Ct. 885 (1998), the court held that 18 U.S.C. 844(h)(1) applies to cross-burnings that violate 18 U.S.C. 241. 98-1024 Pet. App. 3-4. The court explained that "§844(h)(1) contain[s] clear and unambiguous language" encompassing "an offense of any kind that is punishable by a term of imprisonment for more than one year." *Id.*

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ment run consecutively to any other term of imprisonment, including the term imposed for the underlying felony.

at 4 (quoting *Wildes*, 120 F.3d at 470). Therefore, the court held, "the phrase 'any felony' as used in §844(h)(1) . . . includes conspiracy to violate civil rights by burning a cross." 98-1024 Pet. App. 4 (quoting *Wildes*, 120 F.3d at 470).

Petitioners also contended that their convictions pursuant to Section 844(h)(1) violated their First Amendment rights. Because petitioners had not raised that argument in the district court, the court of appeals stated that the claim was "not reviewable * * * absent plain error or fundamental miscarriage of justice." 98-1024 Pet. App. 4. The court of appeals held that petitioners had not satisfied that standard and accordingly affirmed the convictions and sentences. *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not warrant review by this Court. The Court has twice denied petitions for certiorari presenting the question whether Section 844(h)(1) applies to cross-burnings that are prosecuted as felonies under 18 U.S.C. 241. The first time a petition was filed, the United States suggested that the Court grant certiorari to resolve the conflict between the Seventh Circuit's decision in *United States* v. *Hayward*, 6 F.3d 1241 (1993), cert. denied, 511 U.S. 1004 (1994), and that of the Eighth Circuit in *United States* v. *Lee*, 935 F.2d 952, 958 (1991), vacated in part on other grounds, 6 F.3d 1297 (1993), certs. denied, 511 U.S. 1035 and 1046 (1994). The Court denied the petitions in both *Hayward* and *Lee*. Last Term, the Court denied another petition for certiorari in a case presenting the same question. *United States* v. *Wildes*, 120 F.3d 468, 469-471 (4th Cir. 1997),

cert. denied, 118 S. Ct. 885 (1998). There is no reason to reach a different result in the instant case.[3]

1. Petitioners argue (98-1024 Pet. 4-8; 98-6523 Pet. 4-8) that Congress did not intend Section 844(h)(1) to apply to cross-burnings that violate 18 U.S.C. 241. Section 844(h)(1), however, unambiguously covers the criminal conduct for which petitioners were convicted.

The starting point for analysis of a statute has always been the plain meaning of the text. When "the words of a statute are unambiguous, * * * this first canon is also the last." *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 254 (1992) (quoting *Rubin* v. *United States*, 449 U.S. 424, 430 (1981)). "When Congress uses well-settled terminology of criminal law, its words are presumed to have their ordinary meaning and definition." *Salinas* v. *United States*, 118 S. Ct. 469, 476 (1997).

a. In *United States* v. *Gonzalez*, 520 U.S. 1 (1997), the Court construed the requirement in 18 U.S.C. 924(c) that a term of imprisonment imposed for a violation of that Section shall not run concurrently with "any other term of imprisonment." The Court interpreted that provision to apply to state as well as federal terms of imprisonment. The Court explained that "[r]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" 520 U.S. at 5. Because "Congress did not add any language limiting the breadth of that word," the Court found "no basis in the text for limiting § 924(c) to federal sentences." *Ibid.* The Court further observed that "[g]iven the straightforward statutory

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[3] A petition for a writ of certiorari has also been filed in *Hartbarger* v. *United States*, No. 98-6559, which presents the same issue. The government filed its brief in opposition to that petition on December 21, 1998.

command, there is no reason to resort to legislative history." *Id.* at 6.

Section 844(h)(1) is similarly unambiguous. By its terms, it criminalizes the use of fire to commit "any felony which may be prosecuted in a court of the United States." Restriction of Section 844(h)(1) to a subset of federal felonies is inconsistent with Congress's use of the word "any" and with this Court's decision in *Gonzalez*. Even assuming that Congress in enacting Section 844(h)(1) did not focus on that Section's potential application to civil rights conspiracies (see 98-1024 Pet. 6; 98-6523 Pet. 6), Congress employed language that unambiguously covers those crimes.

b. Petitioners contend (98-1024 Pet. 9-15; 98-6523 Pet. 8-13) that they did not "use[] fire * * * to commit" the underlying felony–*i.e.*, the violation of 18 U.S.C. 241–because the civil rights conspiracy was completed when they entered into the agreement. That claim is without merit.

Count One of the indictment in this case charged petitioners with conspiring to "threaten and intimidate" their victims by "burn[ing] crosses in front of [their] mobile home." 98-1024 Pet. App. 14. The indictment specified that "[i]n furtherance of the conspiracy and to accomplish its objectives * * * [petitioner] Alfred Smith * * * set the crosses on fire." *Id.* at 14-15. Because petitioners do not dispute the sufficiency of the evidence (98-1024 Pet. 2; 98-6523 Pet. 2) or claim that they could have achieved the object of their agreement without igniting the crosses, they "use[d] fire * * * to commit" the underlying civil rights violations.

The fact that petitioners could have violated the civil rights conspiracy statute simply by *agreeing* to ignite the crosses, without actually carrying that plan into effect, does not dictate a contrary conclusion. Con-

spiracy is an ongoing offense that "continues as long as the conspirators engage in overt acts in furtherance of their plot." *Toussie* v. *United States*, 397 U.S. 112, 122 (1970). This Court has held that a conspiracy offense may be prosecuted in any district where an overt act in furtherance of the conspiracy took place, even under a statute (the Sherman Act) that does not require the performance of an overt act as an element of the offense. See *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 224-225 n.59, 252-253 (1940). That holding necessarily implies a determination that the offense of conspiracy is "committed" in every place where an overt act occurs. See U.S. Const. Art. III, § 2, Cl. 3; U.S. Const. Amend. VI. In the instant case, petitioners' burning of the crosses furthered their plan and was essential to achieving its objective. The court of appeals therefore correctly held that petitioners "use[d] fire * * * to commit" the conspiracy offense.[4]

c. Petitioners' reliance (98-1024 Pet. 8; 98-6523 Pet. 8) on the rule of lenity is misplaced. As this Court noted in *United States* v. *Wells*, 519 U.S. 482 (1997), "[t]he rule of lenity applies only if, after seizing everything from which aid can be derived, [the Court] can make no more than a guess as to what Congress intended." *Id.* at 499 (citations, ellipsis, and internal

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[4] Like the petitioners in this case, the defendants in *Hayward* argued that "[s]ince the federal felony of conspiracy, under 18 U.S.C. § 241, is complete at the time that the agreement is made, the use of fire in the case at bar gives no vitality to the commission of the conspiracy. The fire was not an aid in formulating the agreement." 6 F.3d at 1248 n.9. The court of appeals in *Hayward* declined to address the argument because it had not been raised in the district court. *Ibid.* Petitioners cite no decision, and we are aware of none, holding that fire cannot be used to commit a conspiracy offense.

quotation marks omitted). Because petitioners used fire in the commission of the predicate civil rights offenses, and because those offenses are felonies prosecutable in courts of the United States, petitioners' conduct is covered by the unambiguous language of Section 844(h)(1).

2. Petitioners contend (98-1024 Pet. 15-18; 98-6523 Pet. 13-16) that the application of 18 U.S.C. 844(h)(1) to this case violated their First Amendment rights. Because petitioners failed to present that argument to the district court, the court of appeals correctly held that the claim was reviewable only for "plain error or fundamental miscarriage of justice." 98-1024 Pet. App. 4. Application of the plain error standard would make this case an unsuitable vehicle for resolution of the question presented even if that question otherwise warranted this Court's review. In any event, petitioners' First Amendment claims are wholly without merit.

Section 241 does not prohibit all expressions of racial animus; it applies to conspiracies "to injure, oppress, threaten, or intimidate any person * * * in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States." 18 U.S.C. 241. It is well established that the First Amendment does not protect threats and intimidation. See *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 388 (1992) ("threats of violence are outside the First Amendment"); *Rankin* v. *McPherson*, 483 U.S. 378, 386-387 (1987) ("a statement that amounted to a threat to kill the President would not be protected by the First Amendment"). Cf. *Boos* v. *Barry*, 485 U.S. 312, 325-329 (1988) (suggesting that a federal statute prohibiting activity undertaken to "intimidate, coerce, threaten or harass" a foreign official satisfied the First

Amendment).[5] Because petitioners disavow any challenge to the sufficiency of the evidence (see 98-1024 Pet. 2; 98-6523 Pet. 2) and do not contest the propriety of the instructions given to the trial jury, application of Section 241 to this case creates no risk of suppression of constitutionally protected expressive conduct.

Petitioners contend (98-1024 Pet. 17-18; 98-6523 Pet. 15-16) that Section 844(h)(1) is unconstitutional as applied to this case because its effect is that threats communicated through the use of fire will be punished more severely than purely verbal threats. That argument is without merit. While the burning cross may be the harbinger of further violence, it is also dangerous in its own right, for fires do not act predictably. The fire set for the purpose of intimidating the victim may ultimately burn down the neighborhood. Congress reasonably determined that felonies (including the threats and intimidation proscribed by Section 241) should be regarded as particularly blameworthy when they are accomplished through the use of fire, with its attendant destructive potential. Even in the rare case where fire is employed as a means of communicating a message, its use poses serious dangers separate and distinct from its communicative element. Application of Section 844(h)(1) to petitioners' conduct therefore does not impermissibly punish them "based on the mode of their expression" (98-6523 Pet. 15). Compare

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[5] See also, *e.g.*, *Wisconsin* v. *Mitchell*, 508 U.S. 476, 484-486 (1993) (noting that the Court has repeatedly rejected First Amendment challenges to federal and state statutes prohibiting discrimination on the basis of race and sex); *Roberts* v. *United States Jaycees*, 468 U.S. 609, 628 (1984) ("acts of invidious discrimination * * * are entitled to no constitutional protection"); *Runyon* v. *McCrary*, 427 U.S. 160, 176 (1976) ("the Constitution places no value on discrimination") (ellipsis omitted).

Wisconsin v. *Mitchell*, 508 U.S. 476, 483 (1993) ("Violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact are entitled to no constitutional protection") (brackets and ellipsis omitted).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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